Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

Leonel Armando Lemus-Lemus

Petitioner,

v.

Eric H. Holder, Jr., United States Attorney General,

Respondent,

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

In support of a claim for asylum relief, Mr. Lemus-Lemus testified to persecution based on membership in a particular social group of Guatemalan Pentecostal preachers. Mr. Lemus-Lemus testified that gang members persecuted him because they knew as a Pentecostal preacher he would be passive and nonviolent. He also explained that the gang members tried to recruit him into the gang but he refused because of his religious beliefs. The United States Court of Appeals for the Second Circuit dismissed the religious characteristics of the proposed social group and held that "a group of young men who reject a gang lifestyle is too broad to constitute a social group."

The First Question Presented is:

1. Whether Guatemalan Pentecostal preachers who oppose gang violence may claim refugee status as members of "a particular social group" under §101(a)(42) of the Immigration and Nationality Act, as added, 94 Stat. 102, 8 U.S.C. §1101(a)(42)?

In addition, Mr. Lemus-Lemus was found to be a credible witness, with the exception of one purported inconsistency between his asylum interview and the testimony at the immigration hearing.

The Second Question Presented is:

2. Is one purported inconsistency sufficient to support an adverse credibility determination under the substantial evidence standard when (1) the testimony was otherwise credited as consistent and (2) a majority of the Circuits hold that a single, minor inconsistency does not meet the substantial evidence standard?

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit denying the Petition for Rehearing en Banc was not published in the Federal Reporter but may be found at *Lemus-Lemus v. Holder,* No. 08-5053-ag (2d Cir. Nov. 3, 2009), reprinted at Petitioner's Appendix (hereinafter "P.A.") 25a.

The opinion of the United States Court of Appeals for the Second Circuit, denying Mr. Lemus-Lemus's Petition for Review on his claims for asylum, withholding of removal, and protection under the Convention Against Torture, was not published in the Federal Reporter but may be found at *Lemus-Lemus v. Holder,* No. 08-5053-ag (2d Cir. Aug. 20, 2009), P.A. 1a.

The decision of the Board of Immigration Appeals dismissing the appeal may be found at *In re Leonel Armando Lemus-Lemus,* No. A200 050 013 (B.I.A. Sept. 22, 2008), aff'g No. A200 050 013 (Immig. Ct. Hartford, Conn. Nov. 29, 2007), P.A. 9a. The order of the Executive Office for Immigration Review, Hartford, Connecticut, denying Mr. Lemus-Lemus' applications for asylum, withholding of removal, and withholding under the regulations implementing the Convention Against Torture may be found at *In re Leonel Armando Lemus-Lemus,* No. A200 050 013 (Immig. Ct. Hartford, Conn. Nov. 29, 2007), P.A. 15a.

Jurisdiction

The United States Court of Appeals for the Second Circuit denied Mr. Lemus-Lemus's Petition for Review on August 20, 2009. P.A. 1a. On November 3, 2009, the Court of Appeals denied Mr. Lemus-Lemus's motion for rehearing *en banc*. P.A. 25a. On November 17, 2009 the Court of Appeals granted Mr. Lemus-Lemus's motion to stay the mandate. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions

Title 28, United States Code §2350 provides in relevant part:

> An order granting or denying an interlocutory injunction under section 2349 (b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254 (1) of this title. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

Statement of the Case

The first question presented in this case is whether Guatemalan Pentecostal preachers who oppose gang membership necessarily constitute a social group under §101(a)(42) of the Immigration and Nationality Act, as added, 94 Stat. 102, 8 U.S.C. §1101(a)(42). Secondly, Mr. Lemus-Lemus raises a question of law as to whether a singe statement that is not contradictory meets the substantial evidence standard for an adverse credibility determination.

The Petitioner, Mr. Lemus-Lemus entered the United States on or about July 31, 2005 to escape persecution in his native country of Guatemala. On August 17, 2005, United States Asylum Officer D. Mills conducted a credible fear interview. P.A. 26a. During the interview, Mr. Lemus-Lemus described beatings and harassment by members of the Mara Salvatrucha who targeted him because of his religious convictions. Mr. Lemus-Lemus told the Asylum Officer that gang members broke his nose with a pistol, chased him with blades and sticks, and said he would be killed at the end of the "Escuipulas" religious celebration. P.A. 37a-41a. Mr. Lemus-Lemus attended church services every Wednesday, Thursday, Friday, Saturday, and Sunday and carried his Bible in the neighborhood of the church before and after services. P.A. 46a. In summarizing the interview, the Asylum Officer noted that "the gang members had much free time to note that Applicant was an evangelical" and "Applicant explained that the gang members feel free to harm Applicant because the gang members believe that Applicant as a Christian does not carry arms, would

not fight back, and would not even report them to government authorities." P.A. 47a. The officer further concluded that, "Applicant demonstrated a significant possibility that may be found to have a well-founded fear that gang members will kill him in part on account of his religion." P.A. 47a.

Following the finding of a "credible fear of persecution," Mr. Lemus-Lemus was placed into removal proceedings before Immigration Judge Michael W. Straus to apply for asylum under §208(b) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. 1158(b), withholding of removal under section 241(b) of the Act, 8 U.S.C. 1231(b), and withholding under the regulations implementing the Convention Against Torture , 8 C.F.R. §1208.

On November 29, 2007, the Immigration Judge denied all forms of relief based on a finding that the past persecution suffered by Mr. Lemus-Lemus was not based on a protected ground. PA 15a. The Immigration Judge held that the testimony was not sufficient to support religious persecution and further held that Mr. Lemus-Lemus failed to establish membership in a particular social group. The Board of Immigration Appeals ("BIA") dismissed Mr. Lemus-Lemus's appeal on September 22, 2008, finding that the credibility determination was not clearly erroneous, and that the record did not support the conclusion that that the gang members were motivated by a protected ground.

On appeal to the United States Court of Appeals for the Second Circuit, Mr. Lemus-Lemus raised questions of law as to whether Guatemalan Pentecostal preachers who oppose gang membership constitute a distinct social group under the definition of refugee. Mr. Lemus-Lemus also challenged the

finding that his testimony was not credible and was not sufficient to support persecution based on a protected ground.

Mr. Lemus-Lemus meets the statutory definition of refugee because he was persecuted, in part, based on his religion and membership in a social group of Guatemalan Pentecostal preachers. The Immigration Judge found the attacks and threats suffered by Mr. Lemus-Lemus met the standard for past persecution, and the BIA did not disturb this finding. P.A. 20a-21a. The persecution suffered by Mr. Lemus-Lemus was on account of his membership in a distinct social group; the gang members persecuted him because he was a Pentecostal preacher that spoke against gang membership. The evidence presented as to the gang's motive was so compelling that no reasonable fact-finder could fail to find the requisite fear of persecution. *See I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483-84, 112 S.Ct.812, 117 L.Ed.2d 38 (1992).

Furthermore, the Immigration Judge and BIA erred in finding that Mr. Lemus-Lemus did not provide sufficient, consistent testimony to support a religious motive for the persecution. The Second Circuit erroneously concluded that substantial evidence in the record supported the adverse credibility determination. P.A. 5a-6a. Rather than examine the record as a whole, the Second Circuit simply noted the one purported inconsistency cited by the BIA; "the omission from Lemus-Lemus's credible fear interview of his alleged activities evangelizing and converting Marasalvatrucha members." P.A. 5a. The Second Circuit grossly misapplied the substantial evidence standard because the BIA and IJ only relied on one minor

inconsistency. The Second Circuit did not consider the record as a whole, and the substantial evidence standard was "misapprehended" and "grossly misapplied." *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-491, 71 S.Ct. 456, 95 L.Ed. 456 (1951). Mr. Lemus-Lemus testified extensively at the credible fear interview, P.A. 35a-47a, and before the Immigration Judge about the gang members's motivation. The singular inconsistent statement is not sufficient to support an adverse credibility determination, and a majority of the Circuits hold that a minor inconsistency does not meet the substantial evidence standard.

Reasons for Granting the Writ

I. This Court should grant certiorari to consider whether religious preachers who oppose gang violence constitute a distinct social group under the statutory definition of refugee in 8 U.S.C. §1101(a)(42).

This Court should grant certiorari to consider whether Guatemalan Pentecostal preachers can claim refugee status as members of "a particular social group," under §101(a)(42) of the Immigration and Nationality Act, as added, 94 Stat. 102, 8 U.S.C. §1101(a)(42)

Congress vested the Attorney General with discretion to grant asylum to refugees, defined under Section 101(a)(42)(A) of the INA as:

> any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is

> unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. 1101(a)(42)(A). The Petitioner in this case claims to be a refugee because of the persecution he suffered as a member of a particular social group of Guatemalan Pentecostal preachers who oppose gang violence. The Second Circuit denied the Petition for Review, relying on the BIA's determination in *Matter of S-E-G-*, 24 I.&N. Dec. 579 (B.I.A. 2008) that young men who resist recruitment by gangs are not a particular social group. However, *Matter of S-E-G-* is not a reasonable interpretation of the statue and is not entitled to *Chevron* deference. Furthermore, Guatemalan Pentecostal preachers who oppose gang violence meet the BIA's criteria for "social group" and are entitled to refugee status.

A. The Petitioner raises a question of statutory interpretation regarding the definition of "membership in a particular social group" under Section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. §1101(a)(42), §1158(b)(1)(B)(i).

The threshold question in this case, whether the BIA reasonably interpreted the phrase "social group," is "a pure question of statutory construction for the courts to decide." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 107 S.Ct. 1207, 94 L.Ed.2d 434

(1987). The narrow question is whether those who are subjected to gang violence because of religious convictions necessarily constitute a social group under Section 101(a)(42)(A) of the INA.

Questions of statutory interpretation require a reading of the plain language of the statute. *See Jimenez v. Quaterman*, 555 U.S. ___, 129 S.Ct. 681, 684-85 172 L.Ed.2d 475 (2009). The plain language of Section 101(a)(42)(A) does not provide a definition of the term "social group." The language of the statue is not clear, "[n]or is this a case where it is clear that Congress had an intention on the precise question at issue." *Negusie v. Holder*, 129 S.Ct. 1159, 1164, 173 L.Ed.2d 20 (2009). Therefore, the Court must look to the "agency's construction of the statute which it administers" and apply the two part test set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). First, the Court asks whether Congress has clearly spoken on the precise issue in question. *Id.* at 843. If the text of the statute is silent or ambiguous, then the Court must determine whether the agency's interpretation is based on a "permissible construction of the statute." *Id.*

The principles of *Chevron* deference are applicable to the Immigration and Nationality Act (INA). *See, e.g., INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 119 S.Ct. 1429, 143 L.Ed.2d 590 (1999)(Holding that the Ninth Circuit Court of Appeals erred in failing to follow the *Chevron* principles when examining a provision of the INA.) Congress has charged the Attorney General with administering the INA, *see* 8 U.S.C. §1101(a)(1), and "the Attorney General, in turn, has delegated to the

BIA the discretion and authority conferred upon the Attorney General by law." *Neguise,* 129 S.Ct. at 1164. As a result, the BIA is the appropriate agency to interpret ambiguous statutory provisions in the INA.

This case presents a "pure question of statutory construction for the courts to decide." *Cardoza-Fonseca*, 480 U.S. at 448. Mr. Lemus-Lemus claims that he was persecuted based on "membership in a particular social group" of Guatemalan Pentecostal preachers. Mr. Lemus-Lemus was persecuted by gang members because they knew he was a devout Pentecostal preacher and he would be nonviolent and forgiving. Mr. Lemus-Lemus' social group claim is distinct from a claim that he was persecuted because of his religious belief in a Christian god. The legal distinction is significant, and the statutory requirement of "membership in a particular social group" does not necessarily exclude religious based social groups. Whether religious preachers can claim refugee status as members of a particular social group, in addition to or in place of persecution based on religion, is a "pure question of statutory construction for the courts to decide." *Id*

B. The statutory language of INA §101(a)(42)(A) is ambiguous as to "membership in a particular social group" and the BIA's interpretation is not a permissible construction of the statute.

The BIA and the Second Circuit erred in interpreting the statutory phrase "membership in a particular social group." The Second Circuit affirmed the BIA's decision that Mr. Lemus-Lemus

was not eligible because "young men who reject a gang lifestyle" fail to meet the definition of a social group. P.A. 5a. However, resisting gang recruitment is distinct from being targeted by gangs because of religious convictions. Mr. Lemus-Lemus claims that gang members targeted him because he is recognized as a religious, nonviolent preacher. The fact that Mr. Lemus-Lemus resisted gang membership does not negate the fact that he was persecuted based on membership in a particular social group of Pentecostal preachers.

Guatemalan Pentecostal preachers meet the requirements of "particularity" and "social visibility" articulated by the BIA in *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) and *Matter of A-M-E & J-G-U, 24 I.&N. Dec. 69 (BIA 2007)*. The BIA defines "particular social group" as a group whose members "share a common immutable characteristic . . . that members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of Acosta*, 19 I&N Dec at 233. A social group also requires "particularity" and "visibility" in the community. *Matter of A-M-E & J-G-U-*, 24 I&N Dec.at 73-74. "The essence of the particularity requirement ... is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." *In re S-E-G-*, 24 I. & N. Dec. 579, 584 (BIA 2008).[1]

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[1] The BIA's definition of "membership in a particular social group" and its requirements of "particularity" and "visibility" merit deference because they are a reasonable interpretation of the statutory scheme. *See Chevron*, 467 U.S. at 843. "The

Guatemalan Pentecostal preachers meet the BIA's definition of "membership in a particular social group" because they have "particularity" and "social visibility" and share "common immutable characteristics." See *Matter of S-E-G*, 24 I&N Dec.at 584, *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). The members of the group are socially visible because they attend church daily, carry a bible, and preach the Pentecostal faith. Mr. Lemus-Lemus testified that "he preached the gospel at meetings and individually in his area in Guatemala and that he was know [sic] as an evangelist." P.A. 17a. Mr. Lemus-Lemus also stated that he attended church services every Wednesday, Thursday, Friday, Saturday, and Sunday and carried his Bible in the neighborhood of the church before and after services. P.A. 46a. A letter from the Pastor at the "Christ Complete Evangelic of Conacastes" in Guatemala confirmed that Mr.Lemus-Lemus was an "active member" and "a person of good conduct and behavior and he is faithful to the Lord." Once he arrived in the United States, Mr. Lemus-Lemus continued in his religious faith by joining the Spanish United Pentecostal Church, where he "participated actively in the church programs" and "would always be a part of the seminaries and biblical studies."

Guatemalan Pentecostal preachers have particular traits that create a definitive boundary to the group. Pentecostal preachers are a distinct,

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BIA's formulation of a test to apply the statutory standard in individual cases and its application of that test [are] precisely the sort of agency actions that merit[] judicial deference." *Neguise*, 129 S.Ct. at 1173. (Stevens, J. concurring and dissenting in part).

invariable group. *Cf. A-M-E & J-G-U-*, 24 I&N Dec. at 76 (Finding that a social group of wealthy Guatemalans was "subjective, inchoate, and variable"); *A-M-E & J-G-U-*, 24 I&N Dec. at 76. (Finding that a group is not particular if "membership is difficult to delimit for a large swath of potential members.") The members of Mr. Lemus-Lemus's social group have a distinct characteristic because they "preach" religion; they disseminate knowledge of their Pentecostal religion and encourage others to practice the faith. A preacher of the Pentecostal faith is identifiable and distinct; such a person has an understanding of the beliefs, traditions, and philosophies of the Pentecostal religion. The act of preaching the Pentecostal faith is a unifying characteristic that narrows the broad group of religious or Christian Guatemalans. Furthermore, religion is a common, immutable characteristic that one should not be required to change. *See Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985)(Finding that "sex, color, or kinship ties," or a shared past experience are immutable characteristics.) It is a trait that "members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Id.*

Mr. Lemus-Lemus was persecuted based on his membership in the particular social group of Guatemalan Pentecostal preachers. The standard to show persecution based on a protected ground requires "*some* evidence," either "direct or circumstantial," that provides proof of the persecutor's motives. *Elias-Zacarias*, 502 U.S. at 483 (emphasis in original.) Mr. Lemus-Lemus's religious

beliefs prompted the gangs to threaten, beat, and harass him. P.A. 18a-19a. Mr. Lemus-Lemus testified that he was persecuted in part because "several of them know I'm Christian." P.A. 16a. The gang members were aware that Mr. Lemus-Lemus was a Christian because he was seen entering the church daily and he carried a bible. P.A. 37a-39a. The Immigration Judge noted, "The statement he gave to the Asylum Officer . . . reflects that the respondent was seen walking in the streets with Bibles in his hand." P.A. 17a. The gang members were aware that as a devout Pentecostal Christian Mr. Lemus-Lemus would not resort to violence when attacked, "And he indicated that, as a Christian, he wouldn't have a weapon." P.A. 18a, 41a. "He stated that he had no means to defend himself, and even if he did he would not because he is a Christian." P.A. 18a, 41a. The Asylum Officer noted that "the gang members had much free time to note that Applicant was an evangelical" and "Applicant explained that the gang members feel free to harm Applicant because the gang members believe that Applicant as a Christian does not carry arms, would not fight back, and would not even report them to government authorities." P.A. 47a. The gang members broke Mr. Lemus-Lemus's nose with a pistol, which required him to seek surgery, and threatened him with death. P.A. 17a-19a, 36a-37a. The persecution suffered by Mr. Lemus-Lemus was on account of his membership in a particular social group of Guatemalan Pentecostal preachers.

In denying the Petition for Review, the Second Circuit relied on *Matter of S-E-G-*, 24 I.&N. Dec. 579 (B.I.A. 2008), in which the BIA held that "young men who resisted recruitment by gangs" do not meet the

standard for "membership in a particular social group" for asylum relief. P.A. 7a. In *Matter of S-E-G-*, the BIA considered an asylum claim by El Salvadorian youth who resisted gang recruitment. *Matter of S-E-G-, 24 I&N.* at 581. The BIA concluded that the group did not meet the test set forth in *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007) requiring "particular and well-defined boundaries" and "a recognized level of social visibility." *Matter of S-E-G-*, 24 I&N Dec. 579, 582. "[V]ictims of gang violence come from all segments of society, and it is difficult to conclude that any group, as actually perceived by the criminal gangs, is much narrower than the general population of El Salvador." *Id.* at 588.

However, the BIA and the Second Circuit have not offered a permissible interpretation of the statute in this case. The fact that gang members were involved in the persecution does not necessarily preclude a person from meeting the definition of a refugee. Mr. Lemus-Lemus met his burden to show a motive for the persecution based on his membership in a particular social group of Guatemalan Pentecostal preachers. The Second Circuit erred in classifying Mr. Lemus-Lemus as a member of a "group of young men who reject a gang lifestyle." P.A. 6a. The social group of Guatemalan Pentecostal preachers is different from general "victims of gang violence" and the Second Circuit erred in likening this case to *Matter of S-E-G-*, where the BIA held that "it is difficult to conclude that any group, as actually perceived by the criminal gangs, is much narrower than the general population of El Salvador." *Matter of S-E-G- 24 I&N* at 586-88; P.A. 7a. The group at hand is much

narrower than the general population of Guatemala. The BIA and Second Circuit's determination that Mr. Lemus-Lemus is not a member of a particular social group is flawed because it only looked at opposition to gang membership. The Second Circuit and the BIA did not consider the more nuanced group of Pentecostal preachers who are persecuted by gangs because of the group's immutable characteristics - not based on simple robbery or gang conscription. The BIA's decision, that Mr. Lemus-Lemus is not a member of a particular social group, is not consistent with the text and structure of 101(a)(42)(A). Therefore, this Court should grant certiorari to consider whether religious preachers can claim refugee status as members of "a particular social group," in addition to or in place of persecution based on religion under §101(a)(42) of the Immigration and Nationality Act, as added, 94 Stat. 102, 8 U.S.C. §1101(a)(42).

II. Contrary to the standards in all other Circuits, the Second Circuit makes adverse credibility determinations based on a single inconsistent statement. This Court should grant certiorari to bring the Second Circuit into conformity with all other Circuits such that credibility determinations must be based on substantial evidence in the record.

This Court should grant certiorari so that it might determine whether a single inconsistent statement is sufficient to make a credibility determination under the substantial evidence standard. The Circuits are divided as to whether one inconsistency can be enough to support an

adverse credibility finding, particularly when the inconsistency is not contradictory to the evidence in the record. The substantial evidence standard requires that the decision "be supported by reasonable, substantial, and probative evidence in the record." *Diallo v. U.S. Dep't of Justice*, 548 F.3d 232, 234 (2d Cir. 2008) (*citing Lin Zhong v. U.S. Dep't of Justice*, 480 F.2d 104, 116 (2d Cir. 2007)) (internal quotation marks omitted). In making an adverse credibility determination, the IJ must provide "specific, cogent reasons" for such a determination, and those reasons must have a "legitimate nexus" to the finding. *Id.* As long as the testimony provided is "generally consistent, rational, and believable, the presence of some inconsistent testimony need not necessarily be fatal to a petitioner's claims if the disparities are relatively minor and isolated and do not concern material facts." *Id.* (*citing Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 335 (2d Cir. 2006)) (internal quotation marks omitted).

A. A single inconsistent statement does not necessarily constitute substantial evidence that a witness is incredible.

A singular inconsistency does not necessarily constitute substantial evidence that Mr. Lemus-Lemus was incredible. As recognized by other Circuits, one inconsistent statement does not automatically establish one as incredible under the substantial evidence standard. One statement can hardly be presumed to be "substantial evidence" under this high standard in all cases. The Second Circuit improperly deferred to the IJ's quick

conclusion that only one inconsistent statement supported an adverse credibility, despite the fact that the IJ declared Mr. Lemus-Lemus to be otherwise credible in his testimony. P.A. 21a-22a. This finding falls far short of the substantial evidence standard requirement. Other Circuits have required more than a single inconsistency before making an adverse credibility ruling.

Unlike the Second Circuit, the Seventh Circuit has refused to uphold an adverse credibility finding on a single inconsistent statement. While the Second Circuit appears comfortable in finding Mr. Lemus-Lemus incredible based solely upon one inconsistent statement, the Seventh Circuit found that six reasons alone were insufficient to support the IJ's decision to discredit the petitioner's testimony in *Georgis v. Ashcroft*, 328 F.3d 962 (7th Cir. 2003). In *Georgis*, despite the IJ finding "numerous discrepancies" between petitioner Georgis's asylum application and her testimony during the hearing, the Seventh Circuit determined that the six noted discrepancies were simply not enough to constitute substantial evidence to support the IJ's finding. *Id.* at 968. These discrepancies included inconsistent dates, the specific whereabouts of Georgis's son, and her failure to disclose certain events in the asylum application. Two questions in the asylum application had specifically asked whether Georgis or her family had ever been arrested, imprisoned, mistreated or threatened by the authorities. Georgis had, in fact, been arrested and beaten in 1993 for participating in a demonstration, and her uncle had been killed as a result of the demonstration, but she failed to mention either of these events on her asylum

application. The Seventh Circuit declined to defer to the IJ's finding that the omissions of the arrest and uncle's death constituted substantial evidence that Georgis was incredible - especially when the other noted discrepancies in the record were minor and unsupported by the evidence: "Having found that the other five reasons given by the IJ for discrediting Georgis are either unsupported by the evidence in the record or based on incomplete or improperly excluded evidence, we are not inclined to defer to his credibility determination on this remaining sixth ground alone." *Id.* at 970. The Seventh Circuit also noted that Georgis provided plausible explanations for her inconsistencies: she considered the arrest and demonstration neither "imprisonment" nor relevant to her case. Although the Seventh Circuit recognized that the IJ is typically afforded a high level of deference, it still refused to defer to his credibility determination based solely upon the inconsistency between Georgis's asylum application and her testimony.

Similarly, in *Tang v. United States Attorney General*, 578 F.3d 1270 (11th Cir. 2009), the Eleventh Circuit did not affirm the adverse credibility finding based upon an inconsistency between Tang's initial airport interview and her later testimony. In her earlier airport interview, Tang did not mention that she had been brutally beaten multiple times in China as a result of her Christian faith. It was not until her later testimony that the petitioner described her multiple beatings inflicted by the Chinese police. The Eleventh Circuit declined to find Tang incredible simply because of the omissions in her first interview, noting that "[h]ere, given Tang's experiences with police coercion

and brutality, it would have been reasonable for her to be less than forthcoming in her initial interview." *Id.* at 1280.

Before jumping to the conclusion that an inconsistent statement plainly indicates a witness's incredibility, the Second Circuit should consider the totality of the circumstances, as well as whether there are plausible reasons given to explain the inconsistency. The Seventh and the Eleventh Circuits, in *Georgis* and *Tang*, both considered the explanations offered to explain the inconsistencies between statements, rather than make the leap to an adverse credibility finding simply because an inconsistency exists. Like Georgis and Tang, Mr. Lemus-Lemus also neglected to mention information in an earlier interview. Unlike the Seventh and Eleventh Circuits, the Second Circuit failed to adequately consider the plausible explanations Mr. Lemus-Lemus provided for his omission of information in his prior interview. When Mr. Lemus-Lemus attended his asylum interview, it was his first interview with authorities. Naturally, he was nervous and afraid. He had also never before attended an interview. Immediately prior to his asylum interview, Mr. Lemus-Lemus had also seen someone near him being beaten by authorities. The Second Circuit erred in overlooking these reasonable explanations for Mr. Lemus-Lemus's inconsistent statement, instead holding Mr. Lemus-Lemus to a higher standard than an average person who would be nervous and forgetful during an important interview.

The Second Circuit's adverse credibility finding based on one inconsistent statement flies in the face of the reasoning and holdings of both the

Seventh and the Eleventh Circuits. This Court should grant certiorari in order to determine whether a single inconsistent statement constitutes substantial evidence, even when there are plausible reasons on the record that explain the inconsistency.

B. When an inconsistent statement is not contradictory and can serve as an elaboration on the evidence already in the record, a court should find that the inconsistent statement is not substantial evidence to support an adverse credibility determination.

A single inconsistent statement that is not contradictory to the rest of the evidence on the record should not be construed to be substantial evidence to support an adverse credibility determination. As long as the testimony provided is "generally consistent, rational, and believable, the presence of some inconsistent testimony need not necessarily be fatal to a petitioner's claims if the disparities are relatively minor and isolated and do not concern material facts." *Diallo*, 548 F.3d at 234 (*citing Xiao Ji Chen*, 471 F.3d at 335) (internal quotation marks omitted). Mr. Lemus-Lemus's inconsistent statement should not have been considered "fatal" to his case because the statement did not contradict any of his testimony or other evidence in the record. Rather, his inconsistent statement should be considered a "helpful elaboration" of his prior testimony.

Additional information offered in later testimony should not be automatically considered a material inconsistency when it does not contradict any other evidence in the record. In *Tang*, the

Eleventh Circuit stated that "the IJ should not focus exclusively on airport interview omissions, rather than contradictions, when determining whether the alien is credible." *Tang*, 578 F.3d at 1279. While the IJ found the later testimony about the Tang's beatings to be a serious inconsistency, the Eleventh Circuit actually recognized it as a "helpful elaboration" of the facts. *Id.* at 1280. The Eleventh Circuit would most likely have recognized Mr. Lemus-Lemus's later testimony to be a helpful elaboration of his earlier asylum interview. Like the petitioner in *Tang*, Mr. Lemus-Lemus neglected to tell the authorities that the Mara Salvatrucha wanted him to stop evangelizing. Mr. Lemus-Lemus had, however, truthfully disclosed that he was a Christian during his asylum interview. To Mr. Lemus-Lemus, being a Christian also encompassed preaching the word of God, which was what he did. Mr. Lemus-Lemus's omission of his evangelical activity is not so much an inconsistency as an elaboration of his commitment to the Pentecostal faith. As it did in *Tang*, the Eleventh Circuit would have looked for contradictions rather than inconsistencies in Mr. Lemus-Lemus's statements. As there were no contradictions, but merely elaborations of what was already in the record in Mr. Lemus-Lemus's case, his single omission and later statement does not constitute a contradiction that supports an adverse credibility finding under the substantial evidence standard.

Unlike the IJ in Georgis, the IJ in this case did not find "numerous discrepancies" with Mr. Lemus-Lemus's testimony. On the contrary, the IJ actually accepted everything else in the record to be perfectly consistent and credible, with the one

exception of the omission. P.A. 21a-22a. With this evidence, the Seventh Circuit, in light of *Georgis* and the court's refusal to uphold the six reasons given, would also not have accepted the IJ's solitary reason for finding Mr. Lemus-Lemus incredible.

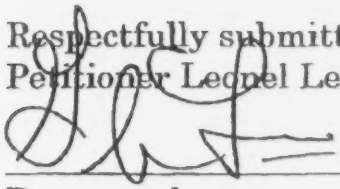
The Second Circuit simply affirmed the IJ's adverse credibility finding without considering the fact that even the IJ found Mr. Lemus-Lemus to be quite consistent in the rest of his testimony, with the sole exception of the omission. Based on *Georgis* and *Tang*, the Seventh and Eleventh Circuits would not have been so quick to uphold the IJ's finding in Mr. Lemus-Lemus's case. The Seventh and Eleventh Circuits would have looked for contradictions in the record, not merely inconsistencies.

The Second Circuit's application of the substantial evidence standard should be brought into conformity with the other Circuits. While the Second Circuit is quick to uphold an adverse credibility finding under this high standard based solely on one inconsistent statement, the Seventh and the Eleventh Circuits have taken more careful, thorough reviews prior to making such a determination. Therefore, this Court should grant certiorari in order to resolve whether a single inconsistent, non-contradicting statement is sufficient to meet the substantial evidence standard.

Conclusion

The Petition for writ of certiorari should be granted.

Respectfully submitted,
Petitioner Leonel Lemus-Lemus



By counsel,
Glenn L. Formica
Formica, P.C.
900 Chapel Street
Suite 1200
New Haven, CT 06510
(203) 787-1946

APPENDIX A

08-5053-ag
Lemus-Lemus v. Holder

BIA
Straus, IJ
A200 050 013

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE

AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick MoynihanUnited States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of August, two thousand nine.

Seal:
United States Court of Appeals
Second Circuit
Filed
August 20, 2009
Catherine O'Hagan Wolfe, Clerk

PRESENT:

Roger J. Miner
Robert A. Katzmann
Richard C. Wesley,

Circuit Judges.

LEONEL ARMANDO LEMUS-LEMUS,
Petitioner,

v. 08-5053-ag
NAC

ERIC H. HOLDER JR., * ATTORNEY GENERAL,
Respondent.

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* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Eric H. Holder Jr. is automatically substituted for former Attorney General Michael B. Mukasey as the respondent in this case.

FOR THE PETITIONER: Glenn L. Formica, New Haven, CT.

FOR THE RESPONDENT: Tony West, Assistant Attorney General, William C. Peachey, Assistant Director, Carol Federighi, Senior Litigation Counsel, Office of Immigration Litigation, United

States Department
of Justice,
Washington, D.C.

UPON DUE CONSIDERATION of this petition for review of a' decision of the Board of Immigration Appeals ("BIA"), it is hereby ORDERED, ADJUDGED, AND DECREED that the petition 'for review is DENIED.

Leonel Armando Lemus-Lemus, a native and citizen of Guatemala, seeks review of a September 22, 2008 order of the BIA affirming the November 29, 2007 decision of Immigration Judge ("IJ") Michael W. Straus, denying his application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). *In re Leonel Armando Lemus-Lemus,* No. A200 050 013 (B.I.A. Sept. 22, 2008), *aff'g* No. A200 050 013 (Immig. Ct. Hartford, Conn. Nov. 29, 2007).

We assume the parties' familiarity with the underlying facts, and procedural history of this case.

When the BIA does not expressly "adopt" the IJ's decision, but its brief opinion closely tracks the IJ's reasoning, we may consider both the IJ's and the BIA' opinions "for the sake of completeness." *Zaman v. Mukasey,* 514 F.3d 233, 237 (2d Cir. 2007) (per curiam) (internal quotation marks omitted). We review the agency's factual findings under the substantial evidence standard. *See* 8 U.S.C. §

1252(b) (4) (B); *see also Corovic v. Mukasey,* 519 F.3d 90, 95 (2d Cir. 2008). Questions of law and the application of law to undisputed fact are reviewed *de novo.See Salimatou Bah v. Mukasey,* 529 F.3d 99, 110 (2d Cir.2008).

I. Asylum & Withholding of Removal

A. Religion - Adverse Credibility Finding

In denying Lemus-Lemus's application for asylum and withholding of removal, we find that the.agency did.not err in finding that he failed to show a nexus. to a protected ground. *See 8* U.S.C. § 1158(b) (1) (B) (i) . Substantial evidence supports the agency's conclusion that Lemus-Lemus was not credible in his statements that he was mistreated by the Marasalvatrucha on account of his religion. .The agency reasonably relied on the omission from Lemus-Lemus's credible fear interview of his alleged activities evangelizing and converting Marasalvatrucha members. *See Xiu Xia Lin v. Mukasey,* 534 F.3d 162, 167 (2d Cir. 2008) (per curiam) (This Court "defer [s] ...to an IJ's credibility determination unless, from the totality of the circumstances, it is plain that no reasonable fact-finder could make such an adverse credibility ruling."). Indeed, while Lemus-Lemus testified that when he was attacked by gang members he was told to stop evangelizing, he failed to mention any evangelizing activities in his credible fear interview. Lemus-Lemus does not challenge the accuracy or

reliability of the credible fear interview, and the interview represents a "sufficiently accurate record" of his responses. *Ramsamachire v. Ashcroft,* 357 F.3d 169, 179 (2d Cir. 2004). Therefore, the agency did not err in relying on Lemus-Lemus's failure to mention his evangelizing activities in his credible fear interview as a basis for its adverse credibility determination. *See id.* at 180-81 ("Where the alien's airport statements and his or her later testimony present materially different accounts of his or her purported persecution,...the inconsistencies may render the alien's testimony incredible.").

B. Membership in a Particular Social Group

In addition, the agency did not err in concluding that Lemus-Lemus was not eligible for relief based on hismembership in the group of "young men who reject a gang lifestyle," as he failed to establish that this is a "particular social group" within the meaning of the Immigration and Nationality Act. *See* 8 U.S.C.§ 1101(a)(42), 1158(b)(1)(B)(i).

In *Ucelo-Gomez v. Mukasey,* we agreed with the BIA's holding that in order to constitute a particular social group, a proposed group must: (1) exhibit a shared characteristic that is socially visible to others in the community; and (2) be defined with sufficient particularity. 509 F.3d 70, 73 (2d Cir. 2007) (per curiam) (citing *Matter of A-M-E-*

& J-G-U-, 24 I. & N. Dec. 69, 74-76 (B.I.A. 2007)). Applying that framework in *Matter of S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008), the BIA considered the cases of applicants from El Salvador who, like Lemus-Lemus, claimed eligibility for asylum based on their membership in the particular social group of young men who resisted recruitment by gangs. The BIA concluded that the proposed group did not satisfy the "particularity" and "social visibility" test set forth in *Matter of A-M-E- & J-G-U,* in part because "victims of gang violence come from all segments of society, and it is difficult to conclude that any `group,' as actually perceived by the criminal gangs, is much narrower than the general population of El Salvador."*Id.* at 586-88; *see also Matter of E-A-G-, 24 I.* & N. Dec. 591, 594 (B.I.A. 2007).

Precedential BIA decisions such as these are entitled to *Chevron* deference, unless "plainly erroneous or inconsistent with the regulation." *See Yuen Jin v. Mukasey,* 538 F.3d 143, 150 (2d Cir. 2008) (internal quotation marks omitted). Here, we defer to the agency's interpretation of the statute as announced in *Matter of S-E-G-* and *Matter of* E-A-G-. Because those decisions consider proposed social groups that are virtually indistinguishable from the group proposed here, we conclude that Lemus-Lemus's social group claim based on his resistance to gang recruitment fails.

II. CAT Relief

Lemus-Lemus fails to challenge the agency's finding that no record evidence indicated that the government was willfully blind to or would acquiesce in his torture by the Marasalvatrucha. *See Khouzam v. Ashcroft,* 361 F.3d 161, 171 (2d Cir. 2004) ("[T]orture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it."). Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal in the absence of manifest injustice. *See Yueging Zhang v. Gonzales,* 426 F.3d 540, 541 n.1, 545 n.7 (2d Cir. 2005). Because Lemus-Lemus failed to address this finding, we deem any challenge to this finding waived. *See id.*

For the foregoing reasons, the petition for review is DENIED. As we have completed our review, any stay of removal that the Court previously granted in this petition is VACATED, and any pending motion for a stay of removal in this petition is DISMISSED as moot. Any pending request for oral argument in this petition is DENIED in accordance with Federal Rule of Appellate Procedure 34(a)(2), and Second Circuit Local Rule 34(b).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: S/_____

APPENDIX B

Seal

U.S. Department of Justice

Department of Justice
Executive Office for
Immigration Review

Executive Office for
Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Formica, Glenn L., Esquire
27 Elm Street
New Haven, CT 06510-000

U.S. DHS/HAR
450 Main St,
Room 483
Hartford, CT
06103-3060

Name: Lemus-Lemus, Leonel Armando
A200-050-013
Date of the Notice: 9/22/2008
Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,
S/
Donna Carr
Chief Clerk

Enclosure
Panel Members
PAULEY, ROGER

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the
Board of
Immigration
Appeals

Falls Church, Virginia 22041

File: A200 050 013 - Hartford, CT

Date: September 22, 2008

In re: LEONEL ARMANDO LEMUS-LEMUS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Glenn L. Formica, Esquire

CHARGE:

Notice: Sec. 212(aX7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Irarnigrant - no valid immigrant visa or entry document

APPLICATION: Asylum; withholding of removal; Convention Against Torture

In a decision dated. November 29, 2007, the Immigration Judge found the respondent removable as charged. He denied the respondent's application for asylum under section 208(b) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b), and

withholding of removal under section 241(b) of the Act, 8 U.S.C. §1231(b), and denied him protection under the Convention Against Torture ("CAT"). 8 C.F.R. § 1208.16-.18. The respondent appealed. The appeal will be dismissed,

The respondent is a 30-year-old native and citizen of Guatemala, who last entered the United States on or about July 31, 2005. The Notice To Appear was issued on August 22, 2005. Venue was changed from Los Angeles, California, to Hartford, Connecticut, on November 28, 2005. He applied for asylum on May 22, 2006. The Immigration Judge found. that the respondent was not credible, in part, and the basis for the threats and attacks was not aprotected ground. The respondent appealed *from* the Immigration Judge's finding that he has not demonstrated eligibility for relief.

The respondent first entered the United States in May 1997. He was baptized a Pentecostal in December 2000. He returned to Guatemala on December 21, 2004, because his father was sick. While he was in Guatemala, he began to preach and converted his family, and also some gang members became believers. He began building a church near his house, where his father will preach. On February 4, 2005, the MS (Mara Salvatrucha) gang accosted him, robbed him, struck him in the face and broke his nose. They allegedly told him to stop his preaching. He had to go to the hospital for treatment. He refused to join a gang, but the gangs tried to recruit him. On July 7, 2005, he was seen buying a cell phone for his

sister; the gang members tried to steal it, but he ran away. Within a couple of days, he was approached and threatened with death by a gang member. He decided to return to the United States. He fears that the gangs will harm him, if he returns to Guatemala, on account of his religion and social group.

The I,mmigcation Judge found the respondent did not establish a nexus with a protected ground. He found the respondent's testimony that the gang members insisted that he stop proselytizing to be lacking in credibility, because he had not mentioned that element in his asylum interview, despite extensive questioning on his religion and the reason he was attacked. He also did not emphasize this kind of threat in his testimony, but stated they chose him, because they knew, as a Christian, he would not be armed or try to harm them. We do not find this credibility finding to be clearly erroneous. 8 C.F.R, § 1003.1(d)(3). . He also found the respondent was not targeted because of his social group, those who oppose gangs, and noted his family members, who have converted, have not been threatened or harmed. The record does not support the claim that the Immigration Judge interrupted the respondent and did not allow him to explain his answers.

Furthermore, even if he testified credibly, the respondent did not present sufficient evidence to sustain his burden of proof that the harm he fears would be on account of his religion or social group. Under the burden of proof required by the REAL ID Act, the respondent must establish that a protected

ground was or will be: "at least one central reason for persecuting the applicant." Section 208(b)(1)(BXI) of the Act, 8 U.S.C. § 1158(b)(I)(B)(I). The record does not support the conclusion that the gang members were motivated by a protected ground. *See Sangho v. INS,* 103 *F.3d 1482* (9th Cir. 1997). The group of young men who reject a gang lifestyle is too broad to constitute a social group. *Matter of C -A-,* 23 I&N Dec. 951 (MA 2006) (social visibility an important consideration of a claimed social group); *Matter of Acosta,* 19 I&N Dec. 211 (BIA 1985); *see Santos-Lemus v. Mukasey,* F.3d 2008 WL 4111900 (9th Cir. 2008); *Dong v, Ashcroft, 406* F.3d 110 (2d Cir. 2005). Recruitment of gang members like recruitment by guerrilla groups is not a protected ground. *See Sanchez v. United States Attorney General,* 392 F.3d 434 (11th Cir, *2004); Lopez-Soto v. Ashcroft, 383* F.3d 228, 235-39 (4th Cir. 2004).The gang members threatened the respondent, but there is no evidence they were motivated by the respondent's religion rather than greed and a desire for revenge at his escape. *See Ontunez-Tursios v. Ashcroft,* 3 03 F.3d 341 (5th Cir. 2002); *Pedro-Mateo v. INS, 224 F.3d* 1147 (9th Cir. 2000) (kidnaping by military and guerrillas not on account of protected characteristic), The Department of State, Bureau,of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices, Guatemala-2005* (March 6, 2007) (Exh. 4) demonstrates a high level of crime and violence exists in Guatemala, but it is not necessarily related to any of the factors listed in the statute. The background evidence does not A200 050 013

A200 050 013

lead to the conclusion that the government in Guatemala ignores gang violence.

The respondent also has not met the heightened clear probability standard *for* withholding of removal, so we find he has not demonstrated he qualifies *for* withholding of removal under section 24I(b)(3) of the Act. The respondent has not shown that the government inflicts, consents to, or acquiesces in torture, or is wilfully accepting of torture by non-governmental actors. *See Zheng v. Ashcroft, 332* F.3d 1186 (9th Cir. 2003). In sum, we find the respondent has failed to demonstrate it is more likely than not he would be tortured by government officials or persons acting on their behalf or with their acquiescence. *Khouzam v. Ashcroft,* 361 F.3d 161 (2d Cir. 2004).

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

S/ of Roger Pauley
FOR THE BOARD

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court
Hartford, Connecticut

File A 200 050 013 November 29, 2007

In the Matter of

Leonel Lemus-Lemus In Removal Proceedings
Respondent

Charge: Section 212 (a)(7)00 (a) of the Immigration and Nationality Act - not in possession of a valid entry document.

Application: Asylum; Withholding of Removal; Withholding of Removal under the Torture Convention.

On Behalf of the Respondent:	On Behalf of the Department of Homeland Security:
Judith Sporn, Esquire 120 Post Road West West Port, Connecticut 06890	Robert K. Bingham, Special Counsel, Hartford, Connecticut

ORAL DECISION OF THE IMMIGRATION JUDGE

INTRODUCTION

The respondent admitted the allegations in the Notice to Appear that he's a citizen of Guatemala. He's presently living in the United States illegally. Accordingly, the Court finds that removability has been established by clear and convincing evidence.

The respondent sought, seeks relief from the forms of asylum and Withholding of Removal.

STATEMENT OF THE FACTS

The respondent was born in Guatemala on July 1st 1978. He has number of brothers and sisters. He stats that he left for the United States and entered the United States illegally in May of 1997 because he was a teacher in Guatemala and he wanted to go to a university but he lacked the money. Respondent came to the United States and worked various jobs and was able to send money to his parents back in Guatemala. He was even able to send money to his parents as well as buy a coffee plantation, which he had workers there.

The respondent went back to Guatemala on December 21st of 2004. Apparently because his father was sick. He moved in with his father. His father had a fairly large house with five bedrooms in a rural area. His father had been retired from the police force since 1993.

The respondent was baptized in the Pentecostal church in 2000 in the United States. He states that his church membership is very important to him. He spends all of his free time in church activities. When he went back to Guatemala he continued those activities. He states that there was a church in the town where his parents lived where there was 60 to

approximately 200 people attending the service. He also stated that there was a much larger Pentecostal church in a nearby town, around 20 minutes away. Soon after the respondent arrived in the United States, he was able to convert his parents and his siblings in January of 2005. Respondent also states that he preached the gospel at meetings and individually in his area in Guatemala and that he was know as an evangelist. The statement he gave to the Asylum Officer in Exhibit 5 reflects that the respondent was seen walking in the streets with bibles in his hand. The respondent also stated that he started to renovate his father's home upon his arrival in Guatemala. He indicated that people in his area certainly thought he had money because he had just come from the United States.

The respondent stated that on February 4th of 2005, he was going to a religious service and had his shoes shined. He states that four men, whom he identified as gang members with tattoos approached him and claims that they told him to stop evangelizing and asked him for his watch and wallet, which the respondent gave to them. Respondent then asked them not to have him. Then he states that they hit him with the back of a pistol in his nose and that the men ran away. The respondent was asked why he didn't tell the Asylum Officer that they told him to stop evangelizing. The Asylum Officer asked a number of specific questions. One of the questions was, what did they say to you in that incident. And his response was my religion prohibits me from saying these words. They told me that if I didn't want to do what they told me that it would be bad for me. He was then asked by the Asylum Officer, why do you think that it has anything to do with your religion. And his response

was because several of them know I'm Christian and know I came from the United States and have money. And because they would not attack someone armed with a weapon. And he indicated that as a Christian he wouldn't have a weapon. He was asked again, can you tell me anything else about how you reached the conclusion you were targeted on account of being Christian? And he answered was because I have no means to defend myself. And even if I did I wouldn't because I'm a Christian. Then he was asked, did they say anything to you about that? And he answered no. I think they were inviting me to do something with them, but I can't. Then he was asked, did you tell them why? And he answered because I'm a Christian, I don't want to hurt anyone.

The respondent stated that luckily that his father's car keys were not taken. He went home. He states that he was seen by a doctor the following Monday and that this incident happened on Friday. The respondent provided some sort of medical report. The doctor diagnosed his nose as broken and treated him. He then states his father made a police report the same day of the incident. Curiously, the police report, which is in the record, indicates that the respondent made the report and the respondent indicates that the police never interviewed him. He sates that there were never any arrests stemming from this incident. He states that his father couldn't really help much with the police because he had retired over 10 years before the incident.

He also stated that this gang, whom they identified as the MS threatened him several times. They told him to stop evangelizing and wanted him to join them. He states that the respondent told them he could not join them due to his religious beliefs.

The respondent then stated that on July 7th, 2005 his father and him always picked up his younger sister from school because of fear that his siblings would be raped or kidnaped for ransom. He stated that he decided to give his sister a cell phone as a present. He stated that a man in plain clothes signaled to some other men from a gang and they told him to give them the phone. The respondent stated that he ran. The respondent also described this in his interview before the Asylum Officer. The respondent then stated that a few days later, while he was getting a haircut, one of the men who was in the gang approached him and threatened him because they were angry about what he did, He claims that some gang members had converted to Pentecostalism. Then he states that he threatened to kill him before the Black Christ Holiday.

The respondent then stated that he did not leave the house. Then he decided to leave Guatemala and come back to the United States. He claims that he heard about another man who had been killed recently by the gang because he was a witness to a gang killing.

The respondent then left Guatemala at the July 21, 2005 and entered the United States illegally on July 31st, 2005. He was arrested by the Border Patrol. He has been given a credible fear interview by an Asylum Officer with an attorney on August 12th of 2005. Then he was placed into removal proceedings.

Respondent states that if he would be deported, the gang would kill him. He states that now his father is the preacher in his town. He states that he preaches out of house. The respondent states

that a few months ago he had sent money to start building of a new Pentecostal church in his village. He indicates that either his parents nor his siblings have been threatened. He has three brothers and two sisters living in Guatemala.

The Court review the background materials regarding the gangs in Guatemala. It states that there's a serious crime problem in Guatemala fueled. by gang activity. It states that there's a lot of gang killings and violence, often between rival gang members.

STATEMENT OF LAW

(Indiscernible) 5208 of the Act, respondent must demonstrate he's a refugee, Section 101(a)(42) or the Act. The regulations on asylum are founded a C.F.R. Section 1208.13(b)(1). The Court would also note that this case is governed by the provisions of the Real Idea Act, see Section 208(b)(3)(B) of the Act.

ANALYSIS AND FINDINGS

The first determination whether the respondent's demonstrated past persecution. He claims that he was attacked by a gang in Guatemala and he was hit with a gun butt and hospitalized and treated. The Court would find that this treatment does rise to the level of persecution. However, it's the respondent's burden to establish that the respondent was subject to past persecution under one of the five protective grounds, namely race, religion, nationality, membership in a

particular social group, or political opinion. See Section 208(b) (3) (A) of the Act.

The respondent's first claim is that he was persecuted based on his religion. The respondent claims that the gang members told him that the wanted him to stop evangelizing and they wanted to stop evangelizing because some of their gang members had converted and quit the gangs. Certainly if that statement is found to be credible, the Court can certainly see a tie in between religion and the past persecution. However, the respondent was asked very detailed questions by the Asylum Officer on this specific matter. The Court would not, he was asked many questions to try to flush out the basis of why the gang treated him the way they treated him. In none of the answers did he say that the gang members wanted him to stop evangelizing. The respondent, however, was asked several times why you've reached the conclusion you being targeted on account of being a Christian? His answer was because I have no means to defend myself, and even if did I wouldn't because I'm a Christian. He also mentioned they had the motive to rob me. The Court certainly understands the limited role of a question and answer. However, when the respondent was asked several times to try to focus on why they wanted to harm him because he was a Christian, the respondent after giving several opportunities failed to mention that they wanted to persecution because he was evangelizing. The respondent said that this was is first interview and he was nervous and afraid. However the Court does not find this as a sufficient excuse when asked the question and asked by the Asylum Officer to flush out the matter several times. The Court would also note that the statement given to the Asylum Officer to be

otherwise consistent with his testimony with the exception of this specific matter. Accordingly, the Court finds that the respondent has not met his burden of proof of establishing that his persecution was on account of his religion.

It does appear that the respondent was targeted because he came from the United States and was known to have money. Indeed he was helping to renovate his father's house and he owned a coffee plantation that had workers. It appears based on this record, that he was targeted not because of religion but because of he was perceived to have money and was seen by the gangs to be somebody they could readily victimize. The other issue is whether the respondent was persecuted because of membership in a particular social group, namely people who oppose gangs. The BIA in the matter of A-M-JG-U-, 24 I&N Dec. 69 (BIA 2007, affirmed 2007 U.S. Lexis 26881,) 2d Cir. November 21, 2007. The two factors that are considered BIA are whether a particular social group has the shared characteristics that gives it's members the requisite social visibility to make them readily identical in society and whether the group can be defined with sufficient particularity to limit it's membership. The Court finds that the particular social group in this case does not meet those tests as set forth by the BIA. The Court does not find that merely being apposed to gangs gives any sort of social visibility in Guatemalan society. In addition, it's simply not possible to really give a specific delimitation to the scope of this social group. In addition, The Court does not find there is any evidence that he was targeted based on opposition to gangs. It appears based on the two incidences that he had with the gangs, he was targeted because they wanted to rob him.

Accordingly, the Court finds that the respondent failed to meet his burden of proof of establishing past persecution based on a particular social group or other protected grounds.

The next determination. is whether the respondent has a well-founded fear of persecution based on a protected ground. Based on the same analysis, the Court finds that he has not met his burden of proof that he'd be targeted in Guatemala based on either religion or membership in a particular social group. Unfortunately, it appears that the respondent was somebody who was victimized by criminal gangs.

Accordingly, the Court finds that the respondent has not established asylum eligibility.

This was respondent has failed meet the well-founded fear standard for asylum, as follows he has failed to meet the clear probability standard for Withholding of Removal. Accordingly, his application for Withholding of Removal under Section 241 (b) (3) of the Act is denied.

The next determination is whether it is more likely than not that the respondent would be tortured if returned to Guatemala. The Court does not find there is sufficient evidence that the Government would acquiesce or be willfully blind under the Kuzan decision to any torture of following the respondent in Guatemala. The Court find there is no evidence, that the police are somehow in cahoots with gangs in Guatemala. Indeed it appears that the police are actively fighting gangs in Guatemala based on the background materials. Accordingly, the respondent has failed to demonstrate that it is more likely than not he'd be tortured if returned to Guatemala.

The respondent appears to ineligible for Voluntary Departure because he was placed into proceedings upon his arrival in the United States.

ORDERS

IT IS HEREBY ORDERED that the respondent's application for Asylum under Section 208 of the Act is denied.

A200 050 013 November 29, 2007

IT IS FURTHER ORDERED that the respondent's application for Withholding of Removal under Section 241 (b)(3) of the Act is denied.

IT IS FURTHER ORDERED that the respondent's application for Withholding of Removal under the Torture Convention is denied.

IT IS FURTHER ORDERED that the respondent be removed to Guatemala.

S/

MICHAEL W. STRAUS
Immigration Judge

A200 050 013 November 29, 2007

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

08-5053-ag
Lemus-Lemus v. Holder
November 3, 2009

Order filed stating, Leonel Armando Lemus-Lemus having filed a petition for panel rehearing, or in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Cour [sic] having considered the request for rehearing en banc, IT IS HEREBY ORDERED that the petition is denied. (For the Court, Deputy Clerk, FP) [Entry date Nov 3 2009] [WD]

APPENDIX E

Department of Homeland Security
U.S. Citizenship and Immigration Services
Record of Determination/ Credible Fear Worksheet

Leonel Lemus-Lemus
A200 050 013
August 16, 2005

SND District Office Code
ZLA Asylum Office Code
LEMUS LEMUS Alien's Last/Family Name
A200 050 013 Alien's File Number
MILLS Asylum Officer's Last Name DAVID Asylum Officer's First Name
GUATEMALA Alien's Nationality

All statements in italics must be read to applicant

SECTION I: INTERVIEW PREPARATION

1.1 7/31/05 Date of Arrival [MM/DD/YY]
1.2 SAS (encountered near Sasabe, AZ) Port of Arrival
1.3 8/02/05 Date of detention [MM/DD/YY]
1.4 ECC Place of destination
1.5 8/16/05 Date of AO orientation [MM/DD/YY]
1.6 delayed receipt of file If orientation more than one week from date of detention, explain delay
1.7 8/16/05 Date of interview [MM/DD/YY]
1.8 ECC Interview Site
1.9 ☒ Applicant received and signed Form M-444 and relevant *pro bone list on* 8/12/05 date signed [MM/DD/YY]
1.10 Does applicant have consultant(s) ☒ Yes ❑ No

1.11 If yes, consultants) name; address, telephone number and relationship to applicant CARDENAS & FIFIELD, 1030 Broadway, Suite 108, El Centro, CA *92243,* 760-353-5710

1.12 Persons present at the interview (check which apply)

1.I3 ☒ Consultant(s)

1.14 ❑ Other(s), list:

1.15 ❑ No one other than applicant and asylum officer

1.16 Language used by applicant in interview: Spanish

1.17 LSA 200350 Interpreter Service, Interpreter ID Number. Interpreter Has Forms ☒ Yes ❑ No 1326pm Time Started 1506PM Time Ended

1.18 Interpreter Service, Interpreter ID Number. Interpreter Has Forms ❑ Yes ❑ No Time Started Time Ended

1.19 Interpreter Service, Interpreter ID Number. Interpreter Has Forms ❑ Yes ❑ No

1.20 ☒ Interpreter was not changed during the interview

1.21 ❑ Interpreter was changed during the interview for the following reason(s):

1.22 ❑ Applicant requested a female interpreter replace a male interpreter, *or vice versa*

1.23 ❑ Applicant found' interpreter was not competent

1.24 ❑ Applicant found interpreter was not neutral

1.25 ❑ Officer found interpreter was not competent

1.26 ❑ Officer found interpreter was not neutral

1.27 ❑ Bad telephone connection

1.28 ☒ Asylum officer read the following paragraph to the applicant at the beginning *of* the interview,:

The purpose of *this interview is to determine whether you may be eligible for asylum or protection from removal to a country where you fear persecution or torture. I am going to ask you questions about why you fear returning to your country or any other country you may be removed to. It is very important that you tell the truth during the interview and that you respond to all of my questions. This may be your only opportunity to give such information. Please feel comfortable telling me why you fear harm. The information you tell me about the reasons for your fear will not be disclosed to your government, except in exceptional circumstances. The statements you make today may be used in deciding your asylum and any future immigration proceedings. It is important that we understand each other. If at any time I make a statement you do not understand, please stop me and tell me you do not understand so that I can explain it to you. If at any time you tell me something I do not understand, I will ask you to explain*

Alien's File Number 200 050 013

SECTIONII: BIOGRAPHIC INFORMATION

2.1 Lemus-Lemus Last Name/Family Name [ALL CAPS]
2.2 Leonel First Name
2.3 Armando Middle Names
2.4 07/01/78 Date of birth [MM/DD/YY]

2.5 Gender☒Male❑Female
2.6 Other Names and dates of birth used
2.7 Guatemala Country of birth
2.8 Guatemala Country (countries) of citizenship (list all)
2.9 7-81, Zonq 2, Santa Rosalia, Esquipulas, Chiquimula, Guatemala Address prior to coming to the U.S. (List Address, City/Town, Province, State, Department and Country).
2.10 Hispanic Applicant's race or ethnicity
2.11 Evangelical Applicant's religion
2.12 Spanish, some English All languages spoken by applicant
2.13 Marital status ☒Single ❑Married ❑Legally Separated ❑Divorced ❑ Widowed
2.14 Did spouse arrive with applicant ❑ Yes ❑ No
2.15 Is spouse included in applicant's claim ❑ Yes ❑ No
2.16 If currently married (including common law marriage) list spouse's name, citizenship, and present location **(if with applicant, provide A-number)**
2.17 Children ❑ Yes ☒ No
2.18 List any children (Use the continuation section to list any additional children):
Date of birth [MM/DD/YY] Name Citizenship Present Location **(if w/PA list A-Numbers)**
Did child arrive with PA? ❑ Yes ❑ No
Is child included in PA's claim? ❑ Yes ❑ No

Alien's File Number 200 050 013

2.19 Does applicant claim to have a medical condition (physical/mental), or has the officer

observed any indication(s) that a medical condition exists? If YES, answer questions 2.20 and

2.21 and explain below ☐ Yes ☒ No

2.20 Has applicant notified the facility of medical condition? ☐ Yes ☐ No

2.21 Does applicant claim that the medical condition relates to torture? ☐ Yes ☐ No

2.22 Does the applicant have a relative, sponsor or other community ties, including spouse or child already listed above? ☒ Yes ☐ No

2.23 If YES, provide information on relative or sponsor (use continuation section, if necessary)

Edgar Lemus Name
cousin Relationship
6860 Goodly St., Apt. 103, Van Nyus CA 91406
Address
818-997-1096 Telephone Number
☐ Citizen ☐ Legal permanent Resident
☒ Other

SECTION III: CREDIBLE FEAR INTERVIEW

The following notes are not verbatim transcript of this interview. These notes are recorded to assist the individual officer in making a credible fear determination and the supervisory asylum officer in reviewing the determination. There may be areas of the individual's claim that were not explored or documented for purposes of this threshold screening.

The asylum officer must elicit sufficient information related to both credible fear of persecution and

credible fear of torture to determine whether the applicant meets the threshold screening. Even if the asylum officer determines in the course of the interview that the applicant has a credible fear of persecution, the asylum officer must still elicit any additional information relevant to a fear of torture. Asylum officers are to ask the following questions and may use the continuation sheet if additional space is required. If the applicant replies YES to any question, the asylum officer must ask follow-up questions to elicit sufficient details about the claim in order to make a credible fear determination.

3.1 a. Have you or any member of your family ever been mistreated or threatened by anyone in any country to which you may be returned? ☒ Yes ☐ No See summary

b. Do you have any reason to fear harm from anyone in any country to which you may be returned?
☒ Yes ☐ No
Alien fears gang members will kill him on account of his religion. He fears that they will kill him because they have threatened to kill him, and have killed others whom they have threatened to kill.

c. If YES to questions a and/or b, was it or is it because of the following reasons? (Check each of the following boxes that apply). ☐Race ☒Religion ☐Nationality ☐Membership in a particular social group ☐Political Opinion

3.2 ☒ At the conclusion of the interview, the asylum officer must read the following applicant:

If the department of Homeland Security determine you have a credible fear of persecution or torture your case will be referred to an immigration court, where you will be allowed to seek asylum or withholding from removal based on fear of persecution or withholding of removal under the Convention Against Torture. The Field Office Director in charge of this detention facility will also consider whether you may be released from detention while you are preparing for your hearing. If the asylum officer determines that you do not have a credible fear of persecution or torture; you may ask an Immigration Judge to review the decision. If you are found to have a credible fear of persecution or torture and you do not request review, you may be removed from the United States as soon as travel arrangements can be made. Do you have any questions? NO

3.3 ☒ At the conclusion of the interview, the asylum officer must read a summary of the claim, consisting of the responses to Questions

3.1 a-c and information recorded in the Additional Information/Continuation section, to applicant.

**** Typed Question and Answer (Q&A) interview notes and a summary and analysis of the claim must be attached to this form for all negative credible decisions. These Q&A notes must reflect that the applicant was asked to explain any inconsistencies or lack of detail on material issues and that the applicant was given every opportunity to establish a credible fear.

SECTION IV: CREDIBLE FEAR FINDINGS

A. Credible Fear Determination

Credibility

4.1 ☒ There is a significant possibility that the assertions underlying the applicant's claim could be found credible in a full asylum or withholding of removal hearing.

4.2 ❑ Applicant found not credible because (check boxes 4.3-4.5, which apply):

4.3 ❑ Testimony was intentionally inconsistent on material issues.

4.4 ❑ Testimony lacked sufficient detail on material issues.

4.5 ❑ Testimony was not consistent with country conditions on material issues

NEXUS

4.6 ❑Race 4.7 ☒Religion 4.8 ❑ Nationality
4.9 ❑ Membership in a Particular Group (Define social group)
4.10 ❑ Political Opinion
4.11❑ Coercive Family planning [CFP]
4.12 No Nexus

Credible Fear Finding

4.13 ☒ Credible fear of persecution established.
OR
4.14 ❑ Credible fear of torture established

OR

4.15 ❑ Credible fear of persecution NOT established and there is not a significant possibility that applicant could establish eligibility for withholding of removal under the Convention against Torture.

B. Possible Bars:

4.16 ❑ Applicant could be subject to a bar(s) to asylum or withholding of removal (check the box(es) that applies and explain on the continuation sheet):

4.17 ❑ Particularly serious crime

4.18 ❑ Security Risk

4.19 ❑ Aggravated Felon

4.20 ❑ Persecutor

4.21 ❑ Terrorist

4.22 ❑ Firmly Resnied

4.23 ❑ Serious nonpolitical crime outside the United States

4.24 ☒ Applicant (indiscernible) subject to a bar(s) to asylum or withholding of removal.

Alien's File Number 200 050 013

C. Identity

4.25 ☒ Applicant's identity was determined with a reasonable degree of certainty (check the box(es) that applies):

4.26 ☒Applicant's own credible statements. (If testimony is credible overall, this will suffice to establish the applicant's identity with a reasonable degree of certainty).

4.27 ❑ Passport which appears to be authentic.

4.28 ❑ Other evidence presented by applicant in applicant's file (List):

4.29 ❑ Applicant's identity was not determined with a reasonable degree of certainty. (Explain on the continuation sheet.)

SECTION V: ASYLUM OFFICER/ SUPERVISOR NAMES AND SIGNATURES

5.1 DAVID MILLS ZLA 085
Asylum Officer name and ID CODE (print)

5.2 signature Asylum Officer's Signature

5.3 8/17/05 Decision date

5.4 MARK FARFAGLIA ZLA 179 Supervisory asylum officer name

5.5 Supervisor's Signature

5.6 Date supervisor approved decision

ADDITIONAL INFORMATION/CONTINUATION

Q. When were you last in the United States?
R. December 21, 2004.
Q. How long had you been in the United States?
R. Eight and one-half years.
Q. Why did you go back to Guatemala?
R My father had a medical emergency. He has high blood pressure.
Q. After you went back to Guatemala during 2004, why have you comeback to the United States now?

R. Because I suffered a robbery. My nose was broken. Then I was robbed again and threatened.
Q. Have you or anyone in your family ever applied for asylum before?
R. No.
Q. Did you ever register to be a member of ABC?
R. I don't know what ABC is.
Q. Have you ever had any other relations in the United States?
R. My brother- cousins.
Q. Have you or anyone in your family applied for NACARA?
R. I believe I have a cousin who applied as a way to residency.
Q. Have any of your relatives petitioned for you to have legal status here?
R. No.
Q. S o you came to the United States during 1996?
R. I came to the United States on May 15, 1996

Q. Had you ever been in the United States before that?
R. No.
Q. Is this the second time you tried to enter the United States?
R. Yes.
Q....First I'll ask you about what you fear, then I'll ask you about any past harm you suffered. Who do you fear in Guatemala?
R. I'm afraid of robbers and gangs.
Q. What harm do you fear the gangs will do to you?
R The gang members, they threatened me. They told me that they would kill me before the July celebrations would end. In my town, Escuipulas, we

celebrate from July 20th to July 26th. We celebrate for Escuipulas, the black Christ.
Q. Why do you believe gang members will target you with killing you?
R. Because the second time, they were unable to rob me. I ran. Two days later. I was having a haircut. And one of them came by and told me that I was not going to survive
Q. Do you have any beliefs as to why the gang members are motivated to kill you?
R. Because they fulfill what they promise today. A young 21-year-old man, who witnessed something that they were doing. And once they told him that they were going to kill him. And they did it.
Q. When did they kill the 21-year old man?
R, About one month and fifteen days ago.
Q. Where?
R. In Esquipulas.
Q.. Why?
R. I think that he may have seen something that they were doing.
Q. Why are the gang members motivated to kill you?
R. I think for my religion.
Q. Please explain.
R. A Christian is different from other people because they don't think of taking revenge, so they can do with you whatever they want.
Q. Are the gang members Christian?
R. They don't believe in God. Because they do satanic acts and they put tattoos on their bodies against God.
Q. The gang members who are motivated to kill you, do they belong to a specific gang?
R. I think so.
Q. What gang?
R. Marasalvatrucha.

Q. Did you see any of their tattoos?
R. I saw them [the tattoos] but I couldn't distinguish them. They [the tattoos] are very united.
Q. How do you believe that they knew you were Christian?
R. Because they see you when you are in the streets with the Bible in hand. Because they do not work, they know whom they are attacking. Because they know that a Christian will not report them to authorities.
Q. Do you go to a specific evangelical church?
R. The name is "Church of God, Complete Evangelical." In the United States, I accepted the word of the Lord. And the church there is called, United Pentecostal Church in the Faith of Christ Jesus.
Q. Where is this church in the United States?
R. Portchester, New York.
Q. Did you go about Escuipulas with a Bible in your hand?
R. Only in the streets near the church, Church of God, Complete Evangelical.
Q. How often did you do that?
R. We have service on Wednesdays, Thursdays, Fridays, Saturdays, and Sundays.
Q. So when you went outside with the Bible, was that associated with each service?
R. Yes.
Q: Please start at the beginning of when you came back to Guatemala December 21, 2004. Did someone rob you?
R. That didn't happen until February 4, 2005. I was next to the office of the phone company. There are the people who shine shoes. Four people came. I never thought that they were going to rob me. One of them

asked me for my money and my watch. I gave them my watch. I removed my wallet. I asked them not to harm me. But one of them hit me with t h e back of a pistol on my nose. And then they ran away.
Q. Is this in Escuipulas?
R Yes.
Q. Who were the robbers?
R They were gang members.
Q. How do you know?
R. Because of the vulgar way they talk and because of t h e i r tattoos.
Q. What did they say to you?
R. My religion prohibits me from saying those words. They told me that if I didn't do what they told me, it would be bad for me, but they this with foul language.
Q. Then what happened?
R. Then I thank God that they did not steal my car because they did not know that I was driving a car. It was my father's car. I washed away the blood and I got home. Then I went with my father to see the doctor.

Q. What's the damage to your nose?
R. My nose was broken inside and outside.
Q. How long were you in pain?
R. After seeing the doctor, two days later, I had surgery on the nose. I was two days at the hospital.
Q. What was the name of the hospital?
R. It was a private hospital, Old City, Zone 10 in the Capital of Guatemala.
Q. This first time, why did the gang members beat you and rob you?
R. I don't know why. I just asked them not to hurt me. And when I said that word ["hurt"], they hit me.

Q. And then there was a second encounter?
R. Yes. My father and I dropped by my sisters at school and picked them up because there have been many kidnappings and rapes. One day my older sister leaves at twelve. This happened on July 7th. I decided to buy her a cellphone. I left at 11:30, one half hour before I went to pick her up. When I was paying for the cellphone, there was a young man dressed in regular clothes, the same way I dress or anyone else. He sees me paying 1300 quetzales. When I left, he signaled someone else. There were other young me between seventeen and twenty four years old with blades and sticks. They told me to give them my cellphone and whatever money I have left. I ran. They couldn't rob me.
Q. Were these young men gang members?
R. I found out later, when the young man came when I was getting a haircut. He was one of them. This happened on July 12th. He told me. After that I went and I gave the cellphone to my sister.
Q. I'm just trying to figure our why this stranger would come up to you and say that he was a gang member.
R. Because they were mad they couldn't rob me. It was then that he told me that he was going to kill me together with his friends, with his gang. After July 12 until the 21st, I was locked in the house. I only attended the church services with my father. And then I decided to come over here, because what they say they are going to do, they do.
Q. Did anyone say why they were targeting you?
R. Because they couldn't rob me. To them it's a scornful joke.
Q. Why do you think this has anything to do with your religion?

R. Because several of them know that I'm a Christian. And they knew that I had come from the United States and that I had money.
Q. Can you tell me any more about why you think that they are targeting you on account of being Christian?
R. Because they would not attack someone armed with a weapon.
Q. Did they say anything to you about being Christian?
R. Yes, because sometimes they had asked me to borrow my father's car, as if I were one of them; but I am not one of them. Because I can not be one of them because they hurt the community. I want peace. I don't want problems.
Q. What does your being Christian have to do with wanting to borrow your father's car?
R. They do that with many people, whether they are Christians or not.
Q. Can you tell me anything else about how you reached the conclusion that they are targeting you on account of being Christian?
R. Because I have no means to defend myself, and even if I did, I wouldn't because I am Christian.
Q. Did they say anything to you about that?
R. No. I think that they were inviting me to do something with them but I can't.
Q. Did you tell them why?
R. Because I'm Christian; I don't want to hurt anybody. I don't want to go to jail. I was coming from a country where there is freedom, the United States.
Q. That's what you told them?
R. I told them that I couldn't participate with them. I'll never do it.

Q. I'm trying to figure out whether anything happened, whether you experienced something or heard something or said something, that indicated that a reason they were targeting you was on account of your religion.
R. I think so. Because many of them have seen me at church. For this motive they had the motive to rob me.
Q. Have you suffered in any other way in Guatemala?
R. No, only the illnesses of my father and my mother.
Q. Do you fear anything else in Guatemala?
R. Only the gangs.
Q. You mentioned this other person who was killed. Do you have any beliefs as to why this other person who was killed by the gang members was targeted by the gang members?
R. Because he saw something and they did not want any witnesses. They are bad people.
Q. Have you or anyone in your family ever belonged to any groups or organizations other than your church?
R. My father worked in the national police.
Q. When?
R. He worked in the national police for twenty-four years. He is now retired.
Q. Did you ever help your father when he worked for the national police?
R. No. I studied.
Q. Were you ever in the military?
R. No.
Q. You told the Immigration Officer near the frontier that your purpose in coming to the United States was to find work.

R. I told him the truth. I told him that I was coming from there with problems and that I wanted someone to help.
Q. This question and answer document taken by the immigration officer at the border, it says, "Do you have any fear or concern about being returned to your home or being removed from the United States?" And then the document indicates that you responded, "No." Please explain.
R. Yes. When I was caught at the border, one of the border patrol agents hit a friend of mine in the eye and the nose. I don't know why he [the agent] did that . And then that same person who hit my friend asked me to sign some papers, a document. They didn't want to listen to me. I was afraid.
Q. What was your father's rank in the national police?
R. I believe that in the end he was a chief. I think it was [located] in several parts. I don't recall. I would need to talk to him about it.
Q. Did you report either of your encounters with the gang members to the police?
R. Only one. My father made the report because I couldn't talk. My face was swollen.
Q. What happened?
R. What I told ,my father is what I told the officer [APSO] now here with me.
Q. Do you know if the police responded at all to your father's report?
R. They [the police] did not get them [gang members]. That's why I did not report the second robbery attempt.
Q. Have you ever experienced any harm as a consequence of contact with government authorities such as police?

R. No.
Q. Did your father believe in strict discipline?
R. Yes.
Q. Did that affect his relationship with you?
R. No.
Q. Did you experience any harm as a result of your father going to the police?
R. No.
Q. Do you fear any harm from any government authorities?
R. If I act properly, no.
Q. Do you fear any harm by anyone who is not a government official but who is acting on behalf of the government?
R. No, because I have not committed any crime or have any problem.
Q. Do you have any reason to believe that government officials would acquiesce in harm done by others, such as the harm you fear from gang members?
R. No. I am not able to say. I don't know.
Q. Did you work in Guatemala?
R. I worked in lands that we have, land in the hills where I grow coffee. And I was working in my coffee plantation.
Q. How large was the plantation?
R. About 5 and 1/2 acres.
Q. Have you ever been stopped by government authorities?
R. No.
Q. Have you ever violated any laws?
R. No.
Q. Have you ever been charged with violating any law?
R. No.

Q. Have you ever received any sort of documentation from any country other than Guatemala?
R. Only I have from the United States. I have a driver's license from the state of Connecticut, and my IRS number.
Q. Have you ever sought or been offered a legal status outside of Guatemala?
R. No.
Q. Have you ever resided in any other countries than Guatemala and the United States?
R. Only those two.
Q. Have you ever been forced to help the members of some group or organization against your will?
R. No.
Q. Have you ever harmed anyone?
R. No.

APSO to Attorney: Do you have any questions or sommenst?
Attorney: [Nods head negatively.]
Alien: No.

APSO to Alien: Is there anything else you want to say?
R. I think that's it. I just told the truth.

Applicant testified that he has not violated any laws, that he has not been charged with violating any laws, that he has not applied for nor been offered a legal status outside of Guatemala, and that the only groups with which he has been associated are evangelical groups. Applicant's father is a retired national police chief. Alien did not indicate that he had harmed anyone.

SUMMARY:

Applicant first came to the United States about May 15, 1996. While in the United States, he attended evangelical services at the United Pentecostal Church in the Faith of Christ Jesus in Protchester, New York. Applicant did not apply for a legal status while in the United States, nor did Applicant believe that anyone had petitioned for a status for him. He returned to Escuipulas, Guatemala during December 2004 after learning that his father was severely ill. Applicant attended church services in Escuipulas at the Church of God, Complete Evangelical on Wednesdays, Thursdays, Fridays, Saturdays, and Sundays. He carried his Bible in the neighborhood of the church before and after the services. Applicant believed that he was also well known among gang members as an evangelical. Applicant explained that as the gang members were not usually employed, the gang members had much free time to note that Applicant was an evangelical. Gang members asked Applicant to join them. Applicant refused.

Members of the Marasalvatrucha gang pistol-whipped Applicant, breaking his nose, in Escuipulas on February 4, 2005. They robbed Applicant of money and a watch. When asked, "The first time, why did the gang members beat you and rob you?" Applicant responded "I don't know why..." Applicant's father reported the incident to the police. The police did not arrest the responsible gang members.

On July 7, 2005, Applicant fled after members of the Marasalvatrucha gang with sticks and razor blades unsuccessfully attempted to rob Applicant. Two days

later, a gang member threatened that the gang would kill Applicant before July 26, 2005, the end of the local festival for Escuipulas, a black Christ.

Applicant believed that the members of Marasalvatrucha targeted him in part because of his religious beliefs. Applicant explained that the gang members feel free to harm Applicant because the gang members believe that the APpliant as a Christian does not carry arms, would not fight back, and would not even report them to government authorities. Applicant described gang members as unbelievers who "...do satanic acts and they put tattoos on their bodies that are against God." Applicant in fact did not report the second robbery attempt to the police nor the following threat because the police had not arrested anyone after Applicant's father had reported the first robbery and assault that had occurred during February 2005.

Applicant described himself as similarly situated to a 21-year old man whom the gang members killed about 45 days ago in Escuipulas. Applicant testified that the gang members threatened to kill the man (Applicant believes on account of having been a witness to their crimes), and soon thereafter killed him.

ANALYSIS:
Applicant demonstrated a significant possibility that he may be found to have a well-founded fear that gang members will kill him in part on account of his religion. Applicant demonstrated a credible fear of persecution